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IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS ATLANTIC CITY ELECTRIC COMPANY, DELMARVA POWER & LIGHT COMPANY, POTOMAC ELECTRIC POWER COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, TAMPA ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, AND UNION ELECTRIC COMPANY, D/B/A AMERENUE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Pole Attachments Act, 47 U.S.C. § 224, grants the Federal Communications Commission jurisdiction to regulate rates for pole attachments by cable multimedia companies that are simultaneously used to provide high-speed Internet access service and conventional cable service.

2. Whether the Pole Attachments Act applies to attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

All Respondents on behalf of whom this brief is filed submitted a Rule 29.6 statement in the joint Brief in Opposition to the Petitions for Writ of *Certiorari*, except Union Electric Company d/b/a Amerenue, which is a wholly-owned subsidiary of Ameren Corporation, a publicly held company.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
COUNTERSTATEMENT OF THE CASE	1
A. The 1978 Pole Attachments Act	1
B. The CTVA Industry's Metamorphosis Into The Cable Multimedia Industry	2
C. The 1996 Amendments To The Act And The FCC's Actions	5
SUMMARY OF THE ARGUMENT	7
I. The Act Does Not Give The FCC Jurisdiction To Regulate Rates For Pole Attachments Providing Simultaneous Cable And Internet Access Services	8
II. The Act Does Not Give The FCC Jurisdiction To Regulate Attachments Of Wireless Equipment	10
ARGUMENT	12
I. The Pole Attachments Act Does Not Give The FCC Jurisdiction To Regulate Rates For Pole Attachments Providing Simultaneous Cable and Internet Access Services	12
A. Congress Expressly Repudiated Any Implied Regulatory Jurisdiction Over Any Aspect Of The Internet	12

TABLE OF CONTENTS—Continued

Page

B. The Unambiguous Plain Meaning Of The Act's Specific Ratemaking Provisions Limits The FCC's Jurisdiction To Attachments Used Solely For Cable Service Or For Telecommunications Service 15

C. Simultaneous Internet Access Service And Cable Service Is Neither Solely Cable Service Nor Telecommunications Service .. 24

1. Congress And The FCC Have Defined Internet Access Service As Distinct From Cable Service Or Telecommunications Service..... 25

2. Internet Access Service Does Not Meet The Definition Of Cable Service 28

3. Internet Access Service Is Not A Telecommunications Service..... 29

4. Remand Is Unwarranted 31

D. Interpreting The Act Not To Provide The FCC Jurisdiction To Regulate Internet Access Service Fulfills Congressional Policy 32

1. The 1996 Act And Congressional Intent Seek To Leave Internet Access Services On An Unregulated Level Playing Field..... 32

2. One Goal Of The 1996 Amendments To The Pole Attachments Act Is To Level The Playing Field Between Cable Systems And Telecommunications Carriers..... 35

TABLE OF CONTENTS—Continued

Page

II. The Pole Attachments Act Does Not Apply To Attachments Of Wireless Telecommunications Equipment 37

A. The Unambiguous Plain Meaning Of The Act Excludes Wireless Telecommunications Equipment 38

B. The FCC's Interpretation Is Unreasonable 43

1. The FCC's Own Interpretations Of The Act Focus Exclusively On Wire Attachments..... 44

2. Attachment Of Wireless Equipment Will Create Unintended and Undue Inequities 46

3. The Wireless Industry Enjoys A Thriving Market And Neither Needs, Nor Was Intended To Receive, Congressional Largesse 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES: Page

Ashcroft v. American Civil Liberties Union, 2001 U.S. LEXIS 3820 (May 21, 2000) 26
AT&T v. Iowa Util. Board, 525 U.S. 366 (1999) 20, 23, 24, 43
AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000) ..... *passim*
Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) 25
Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) 20
Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) 31
Bulova Watch Co. v. United States, 356 U.S. 753 (1961) 17
Burlington Northern Sante Fe Corp. v. Anderson, 959 F. Supp. 1288 (D. Mont. 1997) 22
California v. FCC, 905 F.2d 1217 (9th Cir. 1990) 32
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*
Clifford F. MacEvoy Co. v. United States, 322 U.S. 102 (1944) 16
Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984) 27, 30
Director of Revenue of Missouri v. CoBank ACB, 531 U.S. 316 (2001) 42
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 20
Erlenbaugh v. United States, 409 U.S. 239 (1972) 26
Florida Power Co. v. FCC, 480 U.S. 245 (1987) .. 1, 5

TABLE OF AUTHORITIES—Continued

Page

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) ..... *passim*
Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932) 16
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) 28
GTE Service Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000) 9, 20, 21, 24
Gulf Power Co. v. FCC, 208 F.3d 1263 (11th Cir. 2000) ..... *passim*
Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999) 6, 9, 16, 22
Howard v. America Online, Inc., 208 F.3d 741 (9th Cir. 2000) 32
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 18
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 37
Lorillard v. Pons, 434 U.S. 575 (1978) 19
MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994) 7, 8, 18, 43
Mediaone Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712 (E.D. Va 2000) 28, 29
Missouri v. Ross, 299 U.S. 72 (1936) 17
National Cable Tel. Ass'n. v. FCC, 33 F.3d 66 (D.C. Cir. 1994) 29
National Cable TV Ass'n. v. Gulf Power Co., 121 S. Ct. 879 (2000) 7, 22, 25
National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) 21
Perkins v. Matthews, 400 U.S. 379 (1971) 31
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 9, 14, 28
Rodiguez v. United States, 480 U.S. 522 (1987) 19

TABLE OF AUTHORITIES—Continued

	Page
Rust v. Sullivan, 500 U.S. 173 (1991)	20
State of Missouri ex rel. Missouri Cities Water Co. v. Hodge, 878 S.W. 2d 819 (Mo. 1994)	20
Texas Utilities v. FCC, 997 F.2d 925 (D.C. Cir. 1993)	19
Time Warner Entertainment Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001)	36
Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)	3, 36
United States v. Carmack, 329 U.S. 230 (1946)	20, 21
United States v. Romani, 523 U.S. 517 (1998)	17
UPS v. Mitchell, 451 U.S. 56 (1981)	25
U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999)	20
Whitman v. American Trucking Ass'ns., Inc., 531 U.S. 457, 121 S. Ct. 903 (2001)	*passim*
STATUTES:	
Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified *as amended in various parts* at 47 U.S.C. §§ 151 *et seq.*)	1
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified *as amended* in 47 U.S.C. §§ 151 *et seq.*)	4, 35
47 U.S.C. § 151 (1994 & Supp. IV 1998)	1
47 U.S.C. § 153(20) (Supp. IV 1998)	27, 30
47 U.S.C. § 153(43) (Supp. IV 1998)	29
47 U.S.C. § 153(46) (Supp. IV 1998)	30
47 U.S.C. § 157 (1994)	4, 10, 33
47 U.S.C. § 224 (1994 & Supp. IV 1998)	38
47 U.S.C. § 224 (1978)	2, 38
47 U.S.C. § 224(a) (1994 & Supp. IV 1998)	15, 38
47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998)	11, 15, 34, 41
47 U.S.C. § 224(a)(4) (1978)	2
47 U.S.C. § 224(a)(5) (Supp. IV 1998)	5, 34
47 U.S.C. § 224(d) (1994 & Supp. IV 1998)	5, 39
47 U.S.C. § 224(d)(1) (1994)	16
47 U.S.C. § 224(d)(1) (1978)	2
47 U.S.C. § 224(d)(2) (1994)	11, 39, 45
47 U.S.C. § 224(d)(3) (Supp. IV 1998)	*passim*
47 U.S.C. § 224(e) (Supp. IV 1998)	5, 39
47 U.S.C. § 224(e)(1) (Supp. IV 1998)	*passim*
47 U.S.C. § 224(f) (Supp. IV 1998)	5
47 U.S.C. § 224(f)(1) (Supp. IV 1998)	21
47 U.S.C. § 271(g)(2) (Supp. IV 1998)	8, 32
47 U.S.C. § 332 (1994 & Supp. IV 1998)	42
47 U.S.C. § 332(c) (1994 & Supp. IV 1998)	12, 46
47 U.S.C. § 503(b)(1)(B) (1994)	12, 46
47 U.S.C. § 503(b)(2)(B) (1994)	12, 46
Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified in various parts at 47 U.S.C.)	8, 26, 32
47 U.S.C. § 230 (Supp. IV 1998)	4, 13, 27, 32
47 U.S.C. § 230(b)(1) (Supp. IV 1998)	15, 33
47 U.S.C. § 230(b)(2) (Supp. IV 1998)	8, 10, 13, 32
47 U.S.C. § 230(f)(2) (Supp. IV 1998)	9, 13, 26
Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1999) (codified as 47 U.S.C. § 231)	8, 26, 27, 32
47 U.S.C. § 231(e)(3) (Supp. IV 1998)	9
47 U.S.C. § 231(e)(4) (Supp. IV 1998)	14, 23, 26, 30
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as 47 U.S.C. §§ 521-555)	3

TABLE OF AUTHORITIES—Continued

	Page
47 U.S.C. § 522(2) (1994)	28
47 U.S.C. § 522(6) (1994 & Supp. IV 1998)	28, 29
47 U.S.C. § 522(7) (1994 & Supp. IV 1998)	23
Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in various parts of 47 U.S.C.).	3
49 U.S.C. § 10501(b)(2) (1994)	22
REGULATIONS:	
47 C.F.R. § 1.430 (2000)	31
47 C.F.R. § 1.1402(c) (2000)	45
47 C.F.R. § 1.1404 (2000)	21
47 C.F.R. § 17 (2000)	12, 46
47 C.F.R. § 17.2(a) (2000)	46
47 C.F.R. § 64.702(a) (2000)	32
LEGISLATIVE HISTORY:	
H.R. Conf. Rep. No. 104-458 (1996)	4, 35
H.R. Rep. No. 94-1630 (1976)	40, 41
S. Conf. Rep. No. 104-230 (1996)	4, 10, 35
S. Rep. No. 103-367 (1994)	36
S. Rep. No. 95-580 (1978)	1, 11, 40
ADMINISTRATIVE DECISIONS:	
Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393 (June 29, 1984)	44
Competition, Rate Deregulation and the Commission's Policies Relating to the Provisionof Cable Television Service, 66 Rad. Reg. 2d (P&F) 771 (1990)	3
Heritage Cablevision v. Texas Util. Elec. Co., 6 F.C.C.R. 7099 (1991)	19

TABLE OF AUTHORITIES—Continued

	Page
In re California Water and Telephone Co., 64 F.C.C.R. 2d 753 (1977)	1
In re Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 87 (1996)	9, 27
In re Fed.-State Joint Bd. on Universal Serv., 13 F.C.C.R. 11501 (1998)	9, 27, 30
In re Implementation of Section 703(e) of the Telecommunications Act of 1996;Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 F.C.C.R. 6777 (1998)	*passim*
In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C. 2d 1585 (1978)	1
In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 F.C.C. 2d 59 (1979)	6, 45
In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, 15 F.C.C.R. 6453 (2000)	6, 33
In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864 (1986)	2, 3
In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 15 F.C.C.R. 978 (2000)	42
In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 2001 FCC LEXIS 98 (Jan. 8, 2001)	2, 4, 36

TABLE OF AUTHORITIES—Continued

Page

In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 10 F.C.C.R. 8844 (1995) 47

In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 13 F.C.C.R. 19746 (1998) 48

In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 15 F.C.C.R. 17660 (2000) 12, 47, 48

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration, FCC 01-170 (released May 25, 2001)..... *passim*

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996)..... 4

In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 15 F.C.C.R. 19287 (2000)..... 31

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 15 F.C.C.R. 20913 (2000).....4, 34, 36

In the Matter of Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C. 2d 632 (1979)..... 2

In the Matter of: Carriage of Digital Television Broadcast Signals, 2001 FCC LEXIS 534 (released Jan. 23, 2001) 10, 11

TABLE OF AUTHORITIES—Continued

Page

Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures, 15 F.C.C.R. 8676 (2000)..... 46

Texas Cablevision Co. v. Southwestern Elec. Power Co., 1985 FCC LEXIS 3818 (Feb. 26, 1985) 44

MISCELLANEOUS:

Cable TV Handbook, <http://www.ncta.com/pdf_files/A-CableFacts.pdf> (visited May 18, 2001) 4, 5, 35

The Changing Structure of the Electric Power Industry 2000: An Update, Energy Information Administration, Office of Coal, Nuclear, Electric and Alternative Fuels, U.S. Dep't of Energy (Oct. 2000) 34

David Elmore, *Charter Communications Offers Digital Cable*, MARIETTA DAILY J., Apr. 17, 2001..... 43

John Lewis, *A Treatise on Eminent Domain in the United States*, § 388 (3d ed. 1909)..... 20

COUNTERSTATEMENT OF THE CASE

A. The 1978 Pole Attachments Act.

The cable television ("CATV") industry began simply as a means of providing better reception for television programming received by antennae. *See* Brief of Petitioner National Cable Television Association at 4 ("NCTA Brief"). To accomplish its mission, the CATV industry needed to run coaxial cable to residences, and the most efficient way to do this was to string its cables on utility poles owned by electric utilities and telephone companies. Although the CATV industry sought assistance from the Federal Communications Commission ("FCC" or "Commission") regarding claimed monopoly pricing activities by electric utilities, in 1977 the FCC concluded it had no jurisdiction over electric utilities. *In re California Water and Telephone Co.*, 64 F.C.C. 2d 753, 758-59 (1977).

Congress responded in 1978 by enacting the Pole Attachments Act, 47 U.S.C. § 224 (the "Pole Attachments Act" or the "Act"), one of many legislative initiatives to facilitate the growth of the CATV industry.[1] Included as part of the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (the "Communications Act"), the Act granted the FCC narrow authority over the "communications space" on the poles of electric utilities—solely to the extent the utility had already voluntarily provided a CATV company access to the "communications space"—to regulate the rates, terms, and conditions for pole attachments by CATV companies. *Florida Power Co. v. FCC*, 480 U.S. 245 (1987); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585 (1978); S. Rep. No. 95-580, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 123. In specific terms, the Act granted the FCC authority to regulate "any attachment by a cable

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[1] A copy of the Act as enacted in 1978 is attached at Appendix 1a-4a.

television system," 47 U.S.C. § 224(a)(4) (1978), and provided for one regulated attachment rate. 47 U.S.C. § 224(d)(1) (1978). As a policy measure, the Act coincided with the Commission's approach of relaxing restrictions on the cable industry so as to promote product diversification and growth. *In the Matter of Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C. 2d 632, 645 (1979). At the time, 3,832 cable system operators were providing 11 million households with video services. *Id.* at 654.

B. The CATV Industry's Metamorphosis Into The Cable Multimedia Industry.

In the 23 years since Congress passed the Act, the nascent CATV industry Congress sought to protect has ceased to exist in any recognizable way. The CATV industry is now the cable multimedia industry, with its members providing not merely traditional cable television service, but also data services, Internet access service, broadband service and cable telephony. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 2001 FCC LEXIS 98, ¶¶ 16-17 (Jan. 8, 2001) ("*Seventh Annual Report on Video Programming*"). Cable multimedia companies are corporate giants, with several NCTA members each having annual revenues in the billions. *Id.* at ¶ 27.

This dramatic transformation from a fledgling single-purpose industry to a diversified corporate powerhouse began in the decade after the 1978 Act, as the cable industry began drawing on a wider range of television program sources rather than simply re-transmitting broadcast television signals. *In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C.R. 864, 866 (1986) ("Amendment of Part 76"). Rather than remaining a secondary distribution system, CATV became a

powerful impetus for the growth of video services. *Id.* In recognition of this growth, and the CATV industry's potential for continued growth, Congress passed the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in various parts at 47 U.S.C.) ("1984 Cable Act"). *See* Amendment of Part 76, 1 F.C.C.R. at 866. The 1984 Cable Act established a national policy to encourage "the growth and development of cable television services." *Id.* The Commission followed suit by easing CATV regulations such as those requiring mandatory signal carriage. *Id.* at 864. At the time, however, Congress did not deem it necessary to make any changes to the Pole Attachments Act, nor did the FCC see fit to alter its implementing regulations.

The explosive growth of the CATV industry continued. Between 1984 and 1989, the cable industry increased its annual revenues from $8.5 billion to $17.7 billion and its subscriber base from 37 million to 53 million. *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television* Service, 66 Rad. Reg. 2d (P&F) 771 (1990). In its 1990 Report to Congress, the Commission concluded that its deregulatory posture had promoted the industry's growth, but that there were signs of anti-competitive behavior. *Id.* Congress responded with the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. §§ 521-555 (1994 & Supp. IV 1998)), affording protection for consumers while simultaneously charging the Commission with increasing competition in the marketplace. Two years later, this Court recognized that, because of technological advancements and the "increasing convergence between cable and other electronic media," the cable industry stood "at the center of an ongoing telecommunications revolution with still undefined potential." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 627 (1994).

Congress then passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various parts at 47 U.S.C.) ("1996 Telecommunications Act")—including certain amendments to the Pole Attachments Act discussed below—in order to increase competition in the telecommunications marketplace and to facilitate the deployment of advanced services. 47 U.S.C. § 157 (1994); 47 U.S.C. § 230 (Supp. IV 1998). *See also* S. Conf. Rep. No. 104-230, at 1 (1996); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) ("*Local Competition Order*"). In the wake of the 1996 Telecommunications Act, the cable industry began a system-wide overhaul of its infrastructure, enabling it to provide its customers with traditional video programming as well as cable telephony and high-speed Internet access service. *Seventh Annual Report on Video Programming*, 2001 FCC LEXIS at ¶¶ 10-11.

Today, the CATV industry has become the cable multimedia industry. Cable operators provide high-speed Internet access to approximately 3.2 million customers, surpassing the number of subscribers using wireline, wireless, or satellite technologies for high-speed Internet access. *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 F.C.C.R. 20913, ¶¶ 187-202 (2000) ("Advanced Services Report"). This is in addition to the cable multimedia industry's current customer base of 69 million households. *Cable TV Handbook*, <http://www.ncta.com/pdf_files/A-CableFacts.pdf> (visited May 18, 2001). Industry consolidation has resulted in the top four cable multimedia companies claiming over 50% of all subscribers and the top ten over 80%. *Seventh Annual Report on Video Programming*, 2001 FCC LEXIS at Table C-3. All of this contributes to the cable industry's annual revenues, which, as of last year, exceeded $42 billion. *Cable TV*

Handbook, <http://www.ncta.com/pdf_files/A-CableFacts.pdf>(visited May 18, 2001).

C. The 1996 Amendments To The Act And The FCC's Actions.

As part of Congress' express purpose of facilitating a competitive telecommunications marketplace, the 1996 Telecommunications Act amended the Pole Attachments Act in several relevant ways. It expanded the protections of the Pole Attachments Act to attachments made by telecommunications carriers known as Competitive Local Exchange Carriers ("CLECs"), but did not apply the Act to Incumbent Local Exchange Carriers ("ILECs"). 47 U.S.C. § 224 (a)(5) (Supp. IV 1998). (In plain English, Congress sought to help the new guys, but not the old guys.)

To reflect the inclusion of telecommunications carriers in the Act, Congress also changed the Act's rate provision to provide for two separate rates rather than the previous single cable rate. The Act now provides for one rate for attachments by cable television systems which are used solely to provide cable services and another rate for attachments which are used to provide telecommunications services. *See* 47 U.S.C. §§ 224(d) and (e) (1994 & Supp. IV 1998). The primary difference between the two rates is that the telecommunications rate accounts for both the unusable and usable space on the pole while the cable rate only accounts for the usable space. *Id.*

Another relevant change to the Act was that Congress made it mandatory for pole owners to provide cable television systems and telecommunications providers access to utility poles, except where capacity, safety, engineering or reliability concerns made access unreasonable. 47 U.S.C. § 224(f) (Supp. IV 1998). Where the 1978 version of Act allowed only for voluntary access, *Florida Power Corp.*, 480 U.S. at 251, the 1996 version of Act effects a Fifth Amendment

taking of pole owners' property. *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*"), *cert. granted*, 121 S. Ct. 879 (2001): *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*").

In adopting rules and regulations implementing the 1996 amendments, the Commission refused to determine whether Internet access service constituted "solely cable service," "telecommunications service," or both, or neither. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6795-96 (1998) ("*1998 Report Order*"). Instead, the Commission purported to exercise jurisdiction under subsection (b)(1) of the Act and determined that the rate for solely cable service would nevertheless apply to attachments used to provide both Internet access service and cable service. *Id.* at 6794.

The Commission also ruled that the Pole Attachments Act would now apply to attachments of wireless equipment. *1998 Report and Order*, 13 F.C.C.R. at 6798. During the entire existence of the Act and its purported applicability to "any attachment," the FCC had never regulated any attachment by a cable company besides its wires; indeed, the FCC's promulgated formula rate for attachments spoke only in terms of wires, presuming that the attachment to be regulated would take up only about one foot of the usable space on a pole. *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6466 (2000) ("*2000 Report and Order*"); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C. 2d 59, 70 (1979) ("*1979 Adoption of Rules for Pole Attachments*"). Despite this long-standing interpretation, and the fact that the 1996 amendments had not changed the Act's limited jurisdiction over poles used for "wire communications," 47 U.S.C. § 224(a)(1) (1994 & Supp. IV

1998), the Commission determined that the Act applied to wireless carriers because they are telecommunications carriers. *1998 Report and* Order, 13 F.C.C.R. at 6798.

In the consolidated appeals of the Commission's *1998 Report and Order*, the United States Court of Appeals for the Eleventh Circuit held that the Act did not apply to "pole attachments for Internet service." *Gulf Power II*, 208 F.3d at 1276-78. The Court of Appeals also held that the Act does not "provide the FCC authority to regulate the placement of wireless carriers' equipment." *Id.* at 1275. On January 22, 2001, the Court granted Petitions for *Writ of Certiorari* filed by the Government and the National Cable Television Association. *National Cable TV Ass'n v. Gulf Power Co.*, 121 S. Ct. 879 (2000).

SUMMARY OF THE ARGUMENT

A trilogy of recent decisions by the Court has etched a principle with compelling relevance here. Congress does not leave the "determination whether an entire industry will be entirely or even substantially" regulated to an agency's exploitation of subtle gaps, vague authority and ancillary terms in an act; "it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 121 S. Ct. 903, 909-10 (2001); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Petitioners urge the Court to join their quest for two elephants in the mouseholes of the Act: FCC jurisdiction over pole attachments used for Internet access service, and attachment of wireless telecommunications equipment. Congress, however, enacted no such elephants.

I. The Act Does Not Give The FCC Jurisdiction To Regulate Rates For Pole Attachments Providing Simultaneous Cable And Internet Access Services.

Congress unmistakably engraved its policy as to the Internet, truly a large new breed. "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, **unfettered by Federal or State regulation** . . . ." 47 U.S.C. § 230(b)(2) (Supp. IV 1998) (emphasis added). This unambiguous policy pronouncement in a contemporaneous provision of the 1996 Telecommunications Act precludes FCC jurisdiction over Internet access service based solely on a vague grant of general jurisdiction under subsection (b) of the Pole Attachments Act. *See Brown & Williamson*, 529 U.S. at 137. Analysis of the entirety of the Communications Act as a coherent regulatory scheme, *see id.* at 143-44, underscores this policy, plainly showing that in the three instances where Congress intended to regulate some aspect of the Internet, it did so unambiguously. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as 47 U.S.C. § 231 (Supp. IV 1998)); Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified in various parts of 47 U.S.C.); 47 U.S.C. § 271(g)(2) (Supp. IV 1998). Congress plainly did not contradict the proclaimed "policy of the United States" through silence in the Pole Attachments Act. *See Whitman*, 121 S. Ct. at 909-10; *Brown & Williamson*, 529 U.S. at 159-60; *MCI Telecommunications*, 512 U.S. at 231.

Basic principles of statutory construction confirm this conclusion. The specific authority stated in subsections (d)(3) and (e)(1) of the Pole Attachments Act governs the general authority granted in subsection (b), and establishes that only two rates are authorized—one for cable service and one for telecommunications service. 47 U.S.C. §§ 224(d)(3) and (e)(1) (Supp. IV 1998). No rate is authorized for Internet access service, notwithstanding the identity of the provider, in keeping with the Act's recently clarified emphasis on the nature of service provided. Construing the Act narrowly, as must be done because it effects a taking, *Gulf Power II*, 208 F.3d at 1272-73; *Gulf Power I*, 187 F.3d at 1338; *GTE Service Corp. v. FCC*, 205 F.3d 416, 421-24 (D.C. Cir. 2000), the Court must deny Petitioners' expansive claim that simply because an entity is a "cable television system" it is forever entitled to the cable rate no matter the type of services it actually provides.

The FCC can regulate Internet access service only if it is "solely" cable service or telecommunications service. It fits neither historical definition. Both Congress and the FCC unambiguously have defined Internet access service as separate and distinct from cable or telecommunications service. 47 U.S.C. §§ 230(f)(2) and 231(e)(3) (Supp. IV 1998); *In re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, ¶ 66 (1998); *1998 Report and Order*, 13 F.C.C.R. at 6795; *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R 87, ¶ 69 (1996). In fact, they have plainly stated that it cannot be telecommunications service. *Id.* Practical analysis further demonstrates that the essence of Internet access service—interactive, individual, specific and constant two-way information and data exchange—markedly differs from the essence of cable service—one-way transmission of video programming to subscribers generally. *See AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). *See also Reno v. American Civil Liberties Union*, 521 U.S. 844, 850-52 (1997).

Respondents' plain language interpretation of the Pole Attachments Act comports precisely with Congress' stated policy goals. Repudiating the FCC's unilateral assertion of authority over Internet access service will leave the Internet "unfettered by federal . . . regulation . . ." and will place cable

multimedia companies on equal footing with their competitors in the Internet access service industry. *See* 47 U.S.C. §§ 157 and 230(b)(2) (1994 & Supp. IV 1998). All industry players will pay market-based rates for infrastructure, rather than cable multimedia companies exploiting the Act to their anti-competitive advantage. The correct interpretation of the Act will also achieve Congress' stated goal of leveling the playing field between cable companies and telecommunications companies providing the same services. S. Conf. Rep. No. 104-230, at 178 (1996). Petitioners' interpretation, on the other hand, would allow multimedia companies providing Internet access service to pay the minimal "cable rate," a rate many times lower than the minimum rate telecommunications carrier competitors providing the same Internet access service will have to pay. *In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996, Partial Order on Reconsideration,* FCC 01-170 (released May 25, 2001) ("*Consolidated Partial Reconsideration Order*").[2]

II. The Act Does Not Give The FCC Jurisdiction To Regulate Attachments Of Wireless Equipment.

The nooks and crannies of the Pole Attachments Act reveal no hidden jurisdiction for the FCC to regulate attachments of wireless telecommunications equipment. Instead, the plain language of the Act speaks only of wires—FCC jurisdiction only over utilities which use their poles for "wire communications," 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998), and rates for attachments calculated based on space

[2] Although the issue is not before the Court, *see infra* at n. 14, telecommunications providers simultaneously providing Internet access service and telecommunications service would, at a minimum, have to pay the "telecommunications rate." *See* 47 U.S.C. § 224(e)(1) (Supp. IV 1998). That rate is markedly higher than the "cable rate" because it accounts for both usable and unusable space, while the cable rate accounts only for usable space. *Compare* 47 U.S.C. § 224(d)(3) (Supp. IV 1998), *with* 47 U.S.C. § 224(e)(1) (Supp. IV 1998).

used for "wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2) (1994). The FCC's jurisdiction over "any attachments," 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998), must be parsed carefully; while "any" indeed means "any," "attachment" means wires. That conclusion is not only the implication of the Act's plain language, but is also consistent with Congress' jurisdictional intent. Through the Act, Congress intended to grant the FCC jurisdiction over only the "communications space" on the pole. S. Rep. No. 95-580, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 123. Congress further intended to grant the FCC jurisdiction over poles only to the extent they may be bottleneck facilities, which they plainly are not for wireless equipment. *Gulf Power II*, 208 F.3d at 1274-75.

Although the Pole Attachments Act unambiguously bars the FCC's interpretation, even *Chevron* step two bars the FCC's interpretation as unreasonable. *See Whitman*, 121 S. Ct. at 916. During the entirety of the Act's life span, the FCC has never interpreted its jurisdiction over an "attachment" to apply to anything but wires. That was true from 1978 to 1996 (and, indeed through today) when cable companies routinely used equipment heavily associated with their wires, including wireless "headend" transmitters and receivers, and power boosters. It has also been true since 1996, during which time the FCC has refused, or been unable to, apply its rules to wireless equipment, the "unusual requirements" of which the FCC admits will create "difficulties" with its regulations based on usable space. *Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶¶ 43-45; *1998 Report and Order*, 13 F.C.C.R. at 6799, 6879.

The FCC's untoward interpretation of the Act may also create unwarranted and unfairly burdensome regulatory inequities, such as requiring pole owners to register their poles with the FCC as "antenna structures," thus potentially subjecting them to fines of up to one million dollars for

regulatory violations, *see* 47 U.S.C. §§ 503(b)(1)(B) and (b)(2)(B) (1994); 47 C.F.R. § 17 (2000), and requiring them to navigate a maze of state and local regulatory control over wireless equipment. *See* 47 U.S.C. § 332(c) (1994 & Supp. IV 1998). Finally, and perhaps most telling, the FCC's assertion of jurisdiction to regulate rates for placement of wireless equipment runs counter to Congress' intent to leave the wireless industry a freely competitive market, a policy choice that has helped the wireless industry thrive without the FCC's paternalism. *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 15 F.C.C.R. 17660, 17668 (2000) ("*2000 CMRS Report*").

ARGUMENT

I. THE POLE ATTACHMENTS ACT DOES NOT GIVE THE FCC JURISDICTION TO REGULATE RATES FOR POLE ATTACHMENTS PROVIDING SIMULTANEOUS CABLE AND INTERNET ACCESS SERVICES.

A. Congress Expressly Repudiated Any Implied Regulatory Jurisdiction Over Any Aspect Of The Internet.

Cost regulation, in the form of FCC jurisdiction over pole attachment rates, is explicit for both cable television and telecommunications attachments under the 1996 Telecommunications Act. 47 U.S.C. §§ 224(d)(3) and (e)(1) (Supp. IV 1998). Congress spoke clearly on that point. Congress said nothing at all, however, about similar cost regulation for Internet access service: nothing in the Pole Attachments Act, nothing in the legislative history. Why not? Because, said Congress when it enacted the 1996 Act's only regulatory imposition over the Internet, "[i]t is the policy of the United States . . . to preserve the vibrant and competitive

free market that presently exists for the Internet and other interactive computer services, **unfettered by Federal or State regulation** . . . ." 47 U.S.C. § 230 (b)(2) (Supp. IV 1998) (emphasis added). Deafening silence in the Pole Attachments Act, coupled with an equally deafening repudiation of Internet regulation, leaves no reasonable doubt that Congress had no intention of subjecting Internet access service to cost regulation under the Pole Attachments Act.

Petitioners ignore both Congress' statement and its silence. Instead, Petitioners propose that if certain companies (but not all of their competitors) offer any cable or telecommunications service, the Act should be interpreted to extend FCC regulation to pole attachments used by those particular companies (but not their competitors) to provide Internet access service. Viewed another way, Petitioners assert that Congress intended some Internet access service attachment rates to be regulated, and others not, solely as a function of the particular non-Internet access services offered by the provider. Petitioners' search through the Pole Attachments Act and its history for inferences on which to base an implied grant of jurisdiction over Internet access services is reminiscent of Dashiell Hammett's "blind man in a dark room hunting for a black hat that isn't there." The tools of statutory construction cannot build something from nothing.

When Congress wanted to address, define, or categorize Internet access service in the 1996 Telecommunications Act, it did so explicitly and unambiguously, as in 47 U.S.C. § 230, where it addressed obscenity over the Internet.[3] Similarly, when Congress addressed Internet access services in the 1998 amendments to the Communications Act, it did so explicitly

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[3] "Interactive computer service" is defined to include an information service providing or allowing access by multiple users to a computer system, including an Internet access service. 47 U.S.C. § 230(f)(2) (Supp. IV 1998).

and provided a formal definition.[4] Thus, no legitimate basis exists for believing Congress somehow meant to apply the Pole Attachments Act to commingled Internet access service, but forgot to say so explicitly. "Congress," the Court has held, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 121 S. Ct. at 909-10 (internal citations omitted).[5] Rather than chase Petitioners' elusive elephant, Respondents respectfully urge the Court to follow its practice of refusing to find implicit in a statute authority which has been expressly granted elsewhere, *id.*, or, for that matter, which has been expressly denied elsewhere. *See Brown & Williamson*, 529 U.S. at 137 (Congress' statement of policy regarding the tobacco industry in a "provision of the United States Code currently in force" precluded the Food and Drug Administration's regulation of tobacco as a drug under the separate provisions of the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397). The Pole Attachments Act simply does

[4] 47 U.S.C. § 231(e)(4) (Supp. IV 1998).

[5] The applicability of the Court's metaphor is made clear by another of the Court's recent decisions, *Reno v. ACLU*, 521 U.S. 844 (1997). "The Internet is a unique and wholly new medium of worldwide human communication." *Id.* at 850 (internal quotations and citation omitted). It has experienced "extraordinary growth" and at the time Congress passed the Telecommunications Act, the number of Internet users was expected to "mushroom" from 40 million to "200 million by 1999." *Id.* Internet access tools include a "wide variety of communication and information retrieval methods [which] constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Id.* at 851. "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 852. One shudders to think that Congress—which has carefully addressed things such as make-up and Father's Day—left this unique method of communicating all human thought to the FCC's best guess.

not confer FCC jurisdiction over attachments used to provide Internet access service.

B. The Unambiguous Plain Meaning Of The Act's Specific Ratemaking Provisions Limits The FCC's Jurisdiction To Attachments Used Solely For Cable Service Or For Telecommunications Service.

Petitioners argue that Congress intended the FCC's general authority under 47 U.S.C. § 224(b)(1) to ensure that the "rates, terms, and conditions of pole attachments are just and reasonable" to extend to rates for attachments used to provide Internet access service. Petitioners base their argument on the phrase "any attachment" in 47 U.S.C. § 224(a)(4), which defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service" to an electric utility's[6] poles. 47 U.S.C. § 224(a) (1994 & Supp. IV 1998).[7] Petitioners' narrow focus on Section 224(b), however, misses the point. Isolating sub-section (b) and analyzing it in a vacuum ignores the import of more recent, more specific language in Sections 224 (d)(3) and (e)(1) that expressly limits the FCC's ratemaking powers to

[6] Although the Act discusses attachments to poles owned by other utilities—such as gas, water and steam utilities—and to other infrastructure, including ducts, conduits and rights-of-way, for ease of reference this brief refers only to electric utilities and poles. *See* 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998).

[7] The Federal Petitioners also rely to some extent on 47 U.S.C. § 224(c), which is simply irrelevant to this proceeding. Section 224(c) provides for a "reverse preemption" scheme whereby a state may assert jurisdiction over the regulation of pole attachments in accordance with the sections specified conditions. The Federal Petitioners claim that Section 224(c) is illuminating and demonstrates Congress' ability to place limitations on the FCC's jurisdiction when it so desires. This section in fact speaks not to the contours of the FCC's jurisdiction over rates pursuant to the Act, but rather the division between state and federal regulation of pole attachments *in toto*.

attachments used solely to provide cable and telecommunications services.

Section 224(d) imposes explicit limitations on the general ratemaking jurisdiction conferred by Section 224(b). Subsections 224(d)(1) and (d)(2) establish the specific methodology to be used in setting rates, and subsection (d)(3) specifies when this methodology will apply to cable-only attachments and when to telecommunications attachments.[8] Section 224(d)(3) could not be more explicit in its reference to pole attachments used **"solely to provide cable service."** 47 U.S.C. § 224(d)(3) (Supp. IV 1998) (emphasis added). Subsection 224(e)(1) similarly specifies the FCC's rulemaking and ratemaking jurisdiction for "pole attachments used by telecommunications carriers **to provide telecommunications services.**" 47 U.S.C. § 224(e)(1) (Supp. IV 1998) (emphasis added). There is nothing in these, the Act's only substantive ratemaking provisions, to suggest that the FCC could also engage in ratemaking for attachments used for other services the Act does not address.

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Clifford F. MacEvoy*

[8] "For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by," in essence, the fully allocated costs of providing pole attachments. 47 U.S.C. § 224(d)(1) (1994); *Gulf Power I* at 1327 n.2. "This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service." 47 U.S.C. § 224(d)(3) (Supp. IV 1998).

Co. v. United States, 322 U.S. 102, 107 (1944) (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204 (1932)). *See United States v. Romani*, 523 U.S. 517, 530-31 (1998); *Bulova Watch Co. v. United* States, 365 U.S. 753, 758 (1961); *Missouri v. Ross*, 299 U.S. 72, 75 (1936). This is especially so because Sections 224(d)(3) and (e)(1) were enacted in 1996, eighteen years after the more general language of Section 224(b) relied on by Petitioners. *See Brown & Williamson*, 520 U.S. at 143 (citing *Romani*, 523 U.S. at 530-31).

While Section 224(b) grants the FCC the general authority to regulate the rates, terms, and conditions of pole attachments, the more specific language of Section 224(d)(3) and Section 224(e)(1) makes clear that only attachments used for solely cable service or telecommunications service are subject to the regulated cable or telecommunications rate. The Eleventh Circuit thus correctly held that the Act authorizes two specific rates only, not a multi-service or hybrid rate under subsection 224(b)(1), and that for "the FCC to be able to regulate the rent for an attachment that provides Internet access service then, Internet service must qualify as either a cable service or a telecommunications service." *Gulf Power II*, 208 F.3d at 1276.

This conclusion is consistent with the principle that a statute must be interpreted as a harmonious whole, so that each provision is read in context and with a view to its place in the overall regulatory scheme. *Brown & Williamson*, 529 U.S. at 132-33. Each of the 1996 amendments creating Sections 224(d)(3) and (e) through (i) reflects a specific delineation of the general authority granted the FCC over rates, terms and conditions of pole attachments under Section 224(b). Thus, just as Sections 224(d) and (e) define permissible rates, Sections 224(f) and (h) define the terms and conditions of access. Holding that the FCC could promulgate a non-cable, non-telecommunications, or hybrid rate under Section 224(b), despite the proscriptions of Sections 224(d)

and (e), would be just as erroneous as holding that the FCC could act under the general language of Section 224(b) to allow electric utilities to condition access on a discriminatory basis, or to allow electric utilities to deny access for reasons other than those stated in Section 224(f)(2).

As all Petitioners agree, "in any case of statutory construction, [the] analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations and internal quotation marks omitted); *see* Brief of the Federal Petitioners at 16-1; NCTA Brief at 27. Where Congress has spoken directly to the precise question at issue, an agency's interpretation is entitled to no deference and the Court's "inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress." *Brown & Williamson*, 529 U.S. at 132 (internal citations and quotation marks omitted). As this Court thrice recently has held, "it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as [vague] permission . . . ." *Id.* at 160 (quoting *MCI Telecommunications*, 512 U.S. at 231 (rejecting FCC's argument that it had implicit authority to establish regulation contrary to Congress' express statements)). In a conclusion equally *apropos* here, the Court held that the FDA does not have jurisdiction to regulate tobacco because the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has authority to regulate tobacco products, one must not only adopt an extremely strained understanding of [terms in] the Act . . . but also ignore the plain implication of Congress's subsequent tobacco-specific legislation." *Id.* *See also Whitman*, 121 S. Ct. at 910.

The Eleventh Circuit correctly followed this reasoning when it stated: "the straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." *Gulf Power II*, 208 F.3d at 1276 n.29.

Petitioners' insistence that the general language of Section 224(b) is controlling also ignores the judicial record to which Congress was reacting when it enacted Sections 224(d)(3) and (e) in 1996. Prior to the 1996 amendments, the vague language of Section 224(b) caused the Act arguably to be ambiguous as to whether Congress' regulatory emphasis was on the service provided (*i.e.*, any attachment used for cable service) or the attaching entity (*i.e.*, any attachment for any purpose by a cable company). *Texas Utilities v. FCC*, 997 F.2d 925, 930 (D.C. Cir. 1993). *Texas Utilities* thus held that it was reasonable for the FCC to require an electric utility to charge a cable company the same rate for commingled conventional video programming and "nonvideo communications services, such as data transmission." *Id.* at 927, 935. That decision was in keeping with the FCC's uniform interpretation of the Act since 1978 as requiring "a single regulated rate for pole attachments" that "must fall within the parameters established by Section 224(d)(1)" and leaving "no provision for disparate rates based on the type of service provided." *Heritage Cablevision v. Texas Utilities Electric Co.*, 6 F.C.C.R. 7099, 7105 (1991). Congress is presumed to have been aware of the FCC's and the D.C. Circuit's interpretation of the Act. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). The Eleventh Circuit thus correctly held that because in 1996 Congress stated in Section 224 (d)(3) that "solely" cable service would "receive regulated rates . . . we

now know that the statute emphasizes the type of service over the entity acquiring the attachment." *Gulf Power II*, 208 F.3d at 1277 n.32.

Petitioners' expansive interpretation of Section 224(b) also ignores the requirement that the Act be construed narrowly. A provision of the 1996 Telecommunications Act that effects a taking must be interpreted so as to take as little private property as possible. *See GTE Service Corp.*, 205 F.3d at 422-24. *See also United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946).[9] In *GTE Service Corp.*, which followed this Court's holding in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), the FCC had issued rules under Section 251(c)(6) of the 1996 Act which imposed a duty on ILECs to provide physical or virtual collocation to CLECs. The FCC's rules essentially maximized the requirement for more invasive physical collocation while minimizing the opportunity for less intrusive virtual collocation. *GTE Service Corp.*, 205

[9] This rule is an extension of the principle that "[d]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999). *See also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988). It also naturally flows from the well-settled maxim that a statute in derogation of common law property rights, delegating the authority to take those rights for a public use, should be strictly construed against the taking party. *See, e.g., Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *State of Missouri ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819 (Mo. 1994) (such statutes "must be strictly construed, and the person or body claiming the right to exercise such delegated power must be able to point to the statute which either expressly or by necessary implication confers that right"); John Lewis, *A Treatise on Eminent Domain in the United States* § 388 (3d ed. 1909). Takings authority not expressly granted may be implied "only as a matter of necessity, where the grant [of authority] itself would be defeated unless [takings] power were implied." *Bell Atlantic*, 24 F.3d at 1446 (internal quotations and citations omitted).

F.3d at 418, 420. The D.C. Circuit indicated that Section 251(c)(6) provided "explicit congressional author-ization" for a taking, but held that the provision should be construed to avoid an unnecessary taking of private property. *Id.* at 421, 423 (internal quotations and citations omitted).[10]

[10] The Court has never decided the precise issue addressed by the D.C. Circuit last year in *GTE Service Corp.*; *i.e.*, whether to construe narrowly an act that authorizes a taking in determining the nature and extent of property it takes. Relying on *Iowa Utilities Board*, the D.C. Circuit held that terms in a statute must be given their "ordinary and fair meaning" so as to limit the taking "to that which is required to achieve a desired goal." The narrow construction was "particularly relevant" to avoid "an unnecessary taking of private property." 205 F.3d at 423. Although *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) stated that *Chevron* deference should be given to an agency's interpretation of a statute even though it effects a taking, the case is inapposite for several reasons. First, *Boston & Maine* did not address the determination of the nature and extent of property to be taken, but rather whether a statute required the agency to make a factual finding that the property was actually needed as a prerequisite to taking the property. 503 U.S. at 420-21. There simply was no issue as to the nature and scope of the taking, thus the Court found it appropriate to defer to the agency's determination that the statute did not mandate a factual finding. *Id.* Second, *Boston & Maine* involved a statute where the federal agency, not a private entity, effected a taking. *Id.* at 421. The Court therefore distinguished the case from its earlier holding that statutes granting takings authority to a private entity "are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority." *Carmack*, 329 U.S. at 243 n.13. *Carmack*, and not *Boston & Maine*, applies to the Pole Attachments Act, as it grants the cable company or telecommunications carrier the express right to force the electric utility to relinquish its property upon request. 47 U.S.C. § 224(f)(1) (Supp. IV 1998). Only if the pole owner refuses to agree to the statutorily prescribed rate and the attacher files a pole attachment complaint does the FCC get involved. *See* 47 C.F.R. § 1.1404 (2000). Third, *Boston & Maine* involved the regulatory authority of the Interstate Commerce Commission, a single agency with plenary and exclusive

The mandatory access regime implemented in the 1996 amendments to the Act has been held to effect a taking of Respondents' property. *Gulf Power II* at 1272-73; *Gulf Power I* at 1338.[11] The property taken is the electric utility's property interest in selling space for pole attachments for solely cable services and telecommunications services at market rates. Just as with the FCC's choice of physical collocation over virtual collocation, the FCC cannot be given broad discretion to expand the taking and force electric utilities to part with their property interest in selling pole attachments for Internet access service at market rates. The Act must be construed to avoid, where possible, expanding rate regulation over access for services, or combinations of services, not clearly covered by the Act.[12] The FCC's

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authority over railroad regulation. 49 U.S.C. § 10501(b)(2) (1994) ("jurisdiction of the Board over transportation by rail carriers . . . is exclusive"); *see, e.g., Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997). Here, in contrast, the FCC has very limited jurisdiction over the property of electric utilities; indeed, only to the extent pole attachments are made in the "communications space." Finally, the statute at issue in *Boston & Maine* was passed in specific response to the D.C. Circuit's decision that the prior version of the statute did not authorize the taking effected by the ICC, while a petition for rehearing was pending before the D.C. Circuit. The case represents a unique instance where Congress spoke definitively to approve an agency's position on the very issue the Court faced, thus making deference wholly appropriate.

[11] The Eleventh Circuit has twice held that the Act effects a taking, and neither holding has been put before this Court. *See National Cable TV Ass'n. v. Gulf Power Co.*, 121 S. Ct. 879 (2001).

[12] The Act must also be read narrowly to avoid a constitutional dilemma of which Justice Thomas recently invited analysis—the non-delegation doctrine. *Whitman*, 121 S. Ct. at 920. (Thomas, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' . . . On a future day, however, I would be willing to

unilateral decision that it may take the monumental step of requiring regulated rates for simultaneous cable and Internet access service, without clear Congressional directive, is unlawful.

Finally, even if one believes that the phrase "any attachment by a cable television system" in Section 224(a)(4) means any attachment for any purpose, including commingled Internet access service, the argument is of no avail to Petitioners. As more and more cable companies provide telecommunications service and are thus regulated by the FCC as common carriers, their facilities are considered a "cable system" only "to the extent such facility is used in the transmission of video programming directly to subscribers . . . ." 47 U.S.C. § 522(7) (1994 & Supp. IV 1998). And because the provision of Internet access service is not video programming, *see* 47 U.S.C. § 231(e)(4) (Supp. IV 1998); *City of Portland*, 216 F.3d at 876-77 (9th Cir. 2000). Petitioners cannot bootstrap Internet access service into the definition of cable television system.[13]

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address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

[13] Ultimately, even if the weight of the foregoing did not establish that the FCC has violated the unambiguous language of the statute, it would at least establish that the FCC's interpretation is unreasonable. Should the Court find the Act "silent or ambiguous with respect to the issue [it] must defer to a reasonable interpretation made by the" FCC. *Whitman*, 121 S. Ct. at 916 (quoting *Chevron*, 467 U.S. 837, 844 (1984)). However, where, as here, "the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what . . . is quite clear" the interpretation is unlawful. *Id.* Indeed, the Court has recently held, in a similar analysis, that the FCC transgressed the bounds of reasonable interpretation in applying another provision of the 1996 Act. *Iowa Utilities Board*, 525 U.S. 366. In *Iowa Utilities Board*, the Court vacated a similarly overbroad FCC rule requiring unrestricted access to an ILEC's facilities. "[T]he Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do."

C. Simultaneous Internet Access Service And Cable Service Is Neither Solely Cable Service Nor Telecommunications Service.

The FCC can regulate rates for pole attachments providing simultaneous cable service and Internet access service only if those attachments are either: (1) "any pole attachment used by a cable television system solely to provide cable service" or (2) "any pole attachment used by a cable system . . . to provide telecommunications service." *See* 47 U.S.C.

Id. at 388. In an instructive observation, the Court concluded that, had Congress wanted to provide rights "on a basis as unrestricted as the scheme the Commission has come up with, it would . . . simply have said (as the Commission in effect has)" so and "would not have included any" limiting provision. *Id.* at 390.

Following *Iowa Utilities Board*, the United States Court of Appeals for the District of Columbia Circuit similarly applied a limiting rule to FCC regulations issued under other provisions of the 1996 Act. *GTE Service Corp.*, 205 F.3d at 423-24. In *GTE Service Corp.*, the court found that certain terms in 47 U.S.C. § 251(c)(6) were ambiguous and, turning to *Chevron* step two, emphasized that it would "not uphold an interpretation that diverges from any realistic meaning of the statute." *Id.* at 421, 423 (internal quotations and citations omitted). The court vacated the "offending portions" of the FCC's rule, stating that the "FCC cannot reasonably blind itself to statutory terms in the name of efficiency. *Chevron* deference does not bow to such unbridled agency action." *Id.* at 423-24 (citing *Iowa Utils. Bd.*, 525 U.S. at 389).

In the end, the FCC's attempt to find hidden jurisdiction in the interstices of subsections (a)(4) and (b)(1) of the Act is unreasonable, in a way similar to the EPA's misguided interpretation in *Whitman*. "To use a few apparent gaps in [subsection (d)] to render its textually explicit applicability to [cable service pole attachment rates] utterly inoperative is to go over the edge of reasonable interpretation. The [FCC] may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion. . . . An interpretation of [subsection (d)] so at odds with its structure and manifest purpose cannot be sustained." *See Whitman*, 121 S. Ct. at 919.

§ § 224(d)(3) and (e)(1) (Supp. IV 1998).[14] Internet access service simply cannot be shoehorned into either of these terms.

1. Congress And The FCC Have Defined Internet Access Service As Distinct From Cable Service Or Telecommunications Service.

Both Congress and the FCC have already defined Internet access service as being neither cable service nor telecommunications service. Although Petitioners ignore Congress' definitions, nonetheless those definitions demonstrate two things: (1) Congress was and is aware of the Internet, and in the rare instances where it wanted to regulate some aspect of that freewheeling communications market, it did so; and, (2)

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[14] The issue of whether the FCC can regulate a pole attachment used by a telecommunications carrier, as opposed to a cable multimedia company, to provide commingled telecommunications service and Internet access service is not before the Court. Although the Eleventh Circuit stated "the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service," *Gulf Power II*, 208 F.3d at 1278, the "holding" was stated in loose language. The reality is that the Eleventh Circuit was presented with, analyzed, and decided the issue of whether the FCC could regulate pole attachments of a cable television system providing commingled cable and Internet access service. *Id.* at 1276-77. The FCC decided only that the issue, *1998 Report and Order*, 13 F.C.C.R. at 6793-94, the Court granted *certiorari* only on that issue, *National Cable TV Ass'n v. Gulf Power Co.*, 121 S. Ct. 879 (2000) and the parties have briefed only that issue. *See* Brief of Federal Petitioners at 15; NCTA Brief at 27. Although *amicus* MCI Worldcom agrees that the commingled telecommunications and Internet access service issue is not before the Court, it has argued that, should the Court consider the issue, commingled telecommunications and Internet access service is subject to the telecommunications rate in subsection (e) of the Act. Brief of MCI Worldcom at 4 n.2. The Court's precedent makes clear, however, that it does not decide issues which were neither decided below nor argued by the parties. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 n.25 (1985); *UPS v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

Congress does not consider Internet access service to be either cable or telecommunications service.

Congress has defined Internet access service in two portions of the Communications Act entitled the Child Online Protection Act, 47 U.S.C. § 231 (Supp. IV 1998), and the Communications Decency Act, 47 U.S.C. § 230 (Supp. IV 1998). In the 1996 Telecommunications Act, Congress defined Internet access service as a form of "Interactive computer service," which includes any information service providing or allowing access by multiple users to a computer system. 47 U.S.C. § 230(f)(2) (Supp. IV 1998). The 1998 Child Online Protection defined "Internet access service" as a "service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. **Such term does not include telecommunications services.**" 47 U.S.C. § 231(e)(4) (Supp. IV 1998) (emphasis added).[15]

Although the definitions of "Internet" and "Internet access service" appear elsewhere in the Communications Act than the Pole Attachments Act, the definitions must be read in *pari materia* with other Communications Act provisions defining communications services. *See Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). *See generally Brown & Williamson*, 529 U.S. at 132-33, 143 (terms in an act must be construed in context and with reference to implications of other provisions in relevant statutory scheme). It is telling that Congress deliberately refused to include or refer to such definitions in the Pole Attachments Act. It is more telling

[15] The Court has recently granted *certiorari* to hear a First Amendment challenge to certain provisions of the Child Online Protection Act. *Ashcroft v. American Civil Liberties Union*, 2001 U.S. LEXIS 3820 (May 21, 2001). That case does not bear on the definitions of the Internet and Internet access service.

that Congress squarely refused simply to incorporate or rely upon pre-existing definitions of cable and telecommunications service when it sought to regulate aspects of the Internet and Internet access service under the Communications Decency and Child Online Protection Acts. *See* 47 U.S.C. § 230 (Supp. IV 1998) and 47 U.S.C. § 231 (Supp. IV 1998). Congress unquestionably views Internet access service as neither cable nor telecommunications service.

The FCC itself agrees with Congress' conclusion. It has defined Internet service as an "information service," not as a cable or telecommunications service. *See In re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. at 11533 (1998) ("Internet service providers themselves provide information services, not telecommunications . . . .") ("*Universal Service Report*"); *1998 Report and Order*, 13 F.C.C.R. at 6795 ("The Universal Service Order concluded that Internet service is not the provision of a telecommunications service under the 1996 Act."); *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. at 123 (1996) ("Internet service does not meet the statutory definition of a 'telecommunications service.'") (cited in *Gulf Power II*, 208 F.3d at 1277). The 1996 Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing . . . ." 47 U.S.C. § 153(20) (Supp. IV 1998). Although the FCC has issued a *Notice of Inquiry* as to the classification of cable modem service for regulatory purposes, the FCC is bound by its prior classification of Internet access service unless and until it reaches an alternative conclusion based on a reasoned analysis indicating proper grounds for deliberately changing prior policies and standards. *See Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (citing *Greater Boston Television Corp v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

Given that both Congress and the FCC have classified "Internet access service" as distinct from "cable service" or "telecommunications service," this Court's analysis need go no further. There is no legitimate basis for inferring that when Congress mentioned one of these terms, it actually meant the others or some combination thereof.

2. Internet Access Service Does Not Meet The Definition Of Cable Service.

Even focusing for the sake of argument on the Communications Act's definition of cable service, one cannot force the square peg of Internet access service into the round hole of Congress' long-standing definition. The relevant definitions from the 1996 Telecommunications Act establish that the "essence of cable service . . . is one-way transmission of programming to subscribers generally." *City of Portland*, 216 F.3d at 876; 47 U.S.C. §§ 522(2), (6) and (14) (1994 Supp. IV 1998). The Ninth Circuit therefore concluded that Internet access service cannot be cable service: "Internet access is not one-way and general, but interactive and individual beyond the 'subscriber interaction' contemplated by the statute. . . . [T]he communications concepts are distinct in both a practical and a technical sense." *City of Portland*, 216 F.3d at 876-77. *See also Reno v. ACLU*, 521 U.S. at 850-53 (describing highly personalized and interactive "wide variety of communication and information retrieval methods" available on Internet). [16] In addition, the Court of

[16] In a decision now pending on appeal before the Fourth Circuit, *MediaOne Group, Inc. v. GTE*, Docket No. 00-1680, the United States District Court for the Eastern District of Virginia held that Internet access service in fact falls within the Communications Act's definition of cable service. *MediaOne Group, Inc. v. County of Henrico, VA*, 97 F. Supp. 2d 712 (E.D.Va. 2000). An earlier portion of the opinion, however, apparently reached the opposite conclusion and declared that Internet access service was a telecommunications service. *Id.* at 714. The district court's decision is in fact strikingly devoid of factual exploration or legal analysis, and fails to consider, or even mention, the Ninth Circuit's decision in *City of Portland*. *Id.* at 715.

Appeals observed that "applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results, inconsistent with the statutory structure." *City of Portland*, 216 F.3d at 877. Such a decision "simply makes no sense in any respect, and would be infeasible in many respects." *Id.* (quoting *National Cable Tel. Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (refusing to regulate telecommunications carriers providing video dialtone service as cable television systems)).

The court of appeals below reached a consistent decision. It held that it could not "radically expand the scope of the definition of 'cable service' from a video base to an all-interactive-services base without some substantive indication from Congress that this is indeed its intent." *Gulf Power II*, 208 F.3d at 1277.[17] That decision was correct.

3. Internet Access Service Is Not A Telecommunications Service.

Internet access service likewise does not meet the definition of telecommunications service. "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(43) (Supp. IV 1998). "Telecommunications service" is in turn defined as "the offering of telecommunications for a fee

[17] The 1996 Act made only one change to the preexisting definition of cable service, adding the words "or use." *See* 47 U.S.C. § 522(6)(A) (1994 & Supp. IV 1998). The Eleventh Circuit correctly found this change inconsequential, as it was made without substantive Congressional comment and, in any event, reflects only a slightly increased degree of consumer interaction in the selection of video programming. *Gulf Power II*, 208 F.3d at 1276-77.

directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (Supp. IV 1998).

Although neither the Federal Petitioners nor the NCTA argues the issue, *amici* claim that Internet access service constitutes telecommunications service because Internet access service in fact requires a telecommunications service to deliver the Internet access service. *See* Brief of United States Telecom Association and Verizon Communications at 17. *But cf. City of Portland*, 216 F.3d at 878. That argument has been flatly contradicted by Congress itself: Congress has categorically stated that Internet access service is not a telecommunications service. 47 U.S.C. § 231(e)(4) (Supp. IV 1998). Congress has also categorically stated that *amici's* model of a data service delivered via telecommunications is an information service, which necessarily means that it is distinct from a telecommunications service. 47 U.S.C. § 153(20) (Supp. IV 1998). Moreover, the FCC has held that "information services" and "telecommunications services" are "mutually exclusive," and that entities providing information services "are not thereby providing 'telecommunications service.'" *In re Fed.-State Joint Bd. On Universal Serv.*, 13 F.C.C.R. at 11507-08.[18] The FCC may not change course unless it does so based on a reasoned analysis indicating proper grounds for deliberately changing its prior decision, *Committee for Community Access*, 737 F.2d at 77, which explains why the FCC has not argued on appeal that Internet access service should be classified as a telecommunications service (or a cable service, for that matter).

[18] Although the FCC stated that its holding did not encompass "cable operators providing Internet access service," there is no reason it should not—the analysis is directly transferable. *Universal Service Report*, 13 F.C.C.R. at 11535.

4. Remand Is Unwarranted.

Petitioners request that the Court remand this case to the FCC in the event the Court determines that the issues before the Court depend on how Internet access service is classified. Petitioners' request must be denied for three reasons. First, unlike a situation where the need for agency expertise might support a remand, expertise is not a factor here. "[N]o amount of agency expertise" can change the straightforward interpretation of unambiguous statutory definitions. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). Second, the interests of judicial economy weigh in favor of this Court not remanding a matter where there exists a sufficient basis for the Court to reach its own decision. *See Perkins v. Matthews*, 400 U.S. 379, 386-87 (1971). The Court can decide the issue before it based on clear statutory language, informed by directly relevant FCC decisions. Finally, even to the extent any further clarification might arguably be needed specifically on the issue of cable modem service, the FCC's undue delay in addressing the issue begs the Court to provide the clarification. Five years after the 1996 Act and the start of the current debate, the FCC has initiated no rulemaking addressing the classification of Internet access service. Indeed, as recently as May 25, 2001, the FCC confirmed that it would continue to delay the matter. *Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶ 5.[19]

[19] Although the FCC issued a *Notice of Inquiry* as to the classification of cable modem service in September 2000, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, no rule can result from the *Notice of Inquiry*. *See* 47 C.F.R. § 1.430 (2000).

D. Interpreting The Act Not To Provide The FCC Jurisdiction To Regulate Internet Access Service Fulfills Congressional Policy.

Congress has manifested two policy goals that are relevant here: (1) the Internet and Internet access service are to be left free and unfettered except where Congress has explicitly stated otherwise; and (2) competition on a level playing field in the telecommunications market is of paramount importance. These policies are consistent with one another and with the holding of the Eleventh Circuit.

1. The 1996 Act And Congressional Intent Seek To Leave Internet Access Services On An Unregulated Level Playing Field.

Having defined Internet access services as "information services"—the codified term for what the FCC first called "enhanced services"—the FCC must acknowledge that information services "have never been subject to regulation under the Communications Act." *City of Portland*, 216 F.3d at 878 (citing *Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000)). *See also California v. FCC*, 905 F.2d 1217, 1223-25 (9th Cir. 1990)); 47 C.F.R. § 64.702(a) (2000). Indeed, Congress made this clear in the 1996 Act: "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, **unfettered by Federal or State regulation** . . . ." 47 U.S.C. § 230(b)(2) (Supp. IV 1998) (emphasis added). Congress could not have made more plain its intent to keep government out of the Internet business. In keeping with this policy, in the rare (there are a total of three) instances in which Congress believed it necessary to regulate aspects of the Internet in the Communications Act, Congress did so explicitly and precisely. *See* Communications Decency Act, 47 U.S.C. § 230 (Supp. IV 1998); Child Online Protection Act, 47 U.S.C. § 231 (Supp. IV 1998); 47 U.S.C. § 271(g)(2) (Supp. IV 1998). Congress did not, as Petitioners contend, subtly hide regulation of the Internet in historical definitions of other services.

Petitioners contend that other provisions of the Communications Act suggest Congress sought to regulate Internet access service in the Act. In fact, those provisions support Respondents' analysis. The first states that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1) (Supp. IV 1998). Congress chose to effectuate this policy by allowing the Internet to develop through free market forces.

Petitioners next note that Congress instructed the FCC to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 (1994). Once again, Petitioners forget that Congress specifically distinguished Internet access services from telecommunications service. In addition, regulating the cost for Internet pole attachments pursuant to the FCC's rate formulas would actually create a barrier to infrastructure development by establishing an economically inefficient regulated market that sends the wrong signals for resource allocation. Low regulated pole attachment rates would give pole owners no incentive to create available pole space, such as by voluntarily building taller poles, and leave Internet access service providers with no incentive to establish their own infrastructure in areas and in ways that would most efficiently deploy Internet access cables. *See 2000 Report and Order*, 15 F.C.C.R. at 6461 (pole attachment rates closer to market prices give "the appropriate signal" for investment in facilities).[20]

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[20] Indeed, if, as Petitioners claim, Congress intended to facilitate the deployment of Internet access service "to all Americans" through the Pole

Keeping the FCC out of Internet cost regulation levels the playing field between Internet access service providers, thus promoting competition. Multimedia cable companies have three main competitors in the Internet access service business—ILECs, facilities-based Internet access service providers ("ISPs") and satellite Internet access service providers. *Advanced Services Report*, 15 F.C.C.R. at ¶¶ 96-111. Cable operators provide high-speed Internet access to approximately 3.2 million customers, surpassing the number of subscribers using wireline, wireless, or satellite technologies for high-speed Internet access. *Id.* at ¶¶ 187-201. Ironically, under the FCC's interpretation, the Pole Attachments Act protects only multimedia cable ISPs. ILECs are not entitled to regulated rates under the Act. 47 U.S.C. § 224(a)(5) (Supp. IV 1998). Neither are facilities-based ISPs, such as *amicus* Earthlink, which by definition are neither cable television systems nor telecommunications carriers. *Id.* at § 224(a)(4). And satellite Internet access service providers do not use pole attachments, but have a much higher cost for infrastructure investment than cable systems, and thus have higher retail rates. *See Advanced Services Report*, 15 F.C.C.R. at ¶¶ 187-202. Thus, rather than

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Attachments Act, it would have eliminated the exclusion from mandatory access afforded to railroads, cooperatively organized electric utilities, and government owned electric utilities. *See* 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998). Instead, Congress has left access to utility poles looking something like a giant piece of Swiss cheese, with gaping holes, for example, in the Midwest where there are many electric cooperatives, and in the Northwest and California, where there are many municipal electric utilities. Cooperatives and municipal utilities, in fact, account for 2,921 of the 3,169 electric utilities in the United States. *See The Changing Structure of the Electric Power Industry 2000: An Update*, Energy Information Administration, Office of Coal, Nuclear, Electric and Alternate Fuels, U.S. Dep't of Energy (Oct. 2000) at 18-21. In Petitioners' view of the world, Congress must not have wanted to provide Internet access service to people other than those in higher suburban and urban socio-economic strata.

"penalizing" cable multimedia companies, refusing to confer subsidized rates for their commingled Internet access service under the Act simply levels the playing field among all Internet access service providers. Indeed, the result Petitioners seek would, unsurprisingly, leave all other ISPs with higher infrastructure costs, resulting in exactly the imbalanced regulated market and infrastructure investment disincentives Congress sought to avoid.

2. One Goal Of The 1996 Amendments To The Pole Attachments Act Is To Level The Playing Field Between Cable Systems And Telecommunications Carriers.

Denying multimedia cable companies the low cable-only rate for attachments providing Internet access service also serves Congress' primary goal in the 1996 Telecommunications Act—the promotion of free competition in the telecommunications industry. Not only is that the overarching stated goal of the 1996 Act, 1996 Telecommunications Act, Preamble, Pub. L. No. 104-104, 110 Stat. 56, 56, H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124, it is also the reason subsection (d)(3) of the Act provides that when multimedia cable companies and telecommunications providers use pole attachments to provide telecommunication services, they will pay the same "telecommunications rate." 47 U.S.C. § 224(d)(3) (Supp. IV 1998).

The original rationale of the 1978 Act—protecting small, local cable companies from large utilities—no longer holds. The multimedia cable industry is a behemoth, expanding exponentially. There are now sixty-nine million households subscribing to cable service. *Cable TV Handbook*, <http://www.ncta.com/pdf_files/A-CableFacts.pdf> (visited May 18, 2001). The industry's annual revenues, as of last year, exceeded $42 billion. *Id.* Although the NCTA would have the Court believe that thousands of independent CATV

operators exist, the reality is that with industry consolidation the top four cable multimedia companies now claim over 50% of all subscribers and the top ten over 80%. *Seventh Annual Report on Video Programming*, 2001 FCC LEXIS at Table C-3. Indeed, against this backdrop of continuing industry growth and consolidation, Time-Warner successfully challenged FCC regulations that limited any one cable company from enlisting more than 30% of all subscribers nation-wide. *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001). Thus, it is simply untenable to argue that the industry needs government sanctioned regulation to protect it at the expense of electric utility ratepayers, and specious to argue that the Act should be stretched to accomplish that end.

In fact, the current path of multimedia cable companies is making them direct competitors to traditional telecommunications carriers, as the multimedia companies now stand "at the center of an ongoing telecommunications revolution with still undefined potential." *Turner Broadcasting System*, 512 U.S. at 627. They have overhauled their infrastructure to provide cable telephony and high-speed Internet access service. *Advanced Services Report*, 15 F.C.C.R. at ¶¶ 187-90.

In subsection (d)(3) of the Pole Attachments Act, Congress sought, among other things, to level the playing field between telecommunications carriers and their new competitors, cable multimedia companies. S. Rep. No. 103-267, at 65 (1994). Petitioners' interpretation of the Act, however, would tilt the scales in favor of multimedia cable companies at the expense of telecommunications carriers. While multimedia cable companies would pay the low regulated cable rate for Internet access pole attachments, ILECs and CLECs, the most likely source of new downward price competition in the Internet access service business, would have to pay a higher rate. Although the question of what rate a CLEC must pay for a pole attachment providing commingled telecommunications

service and Internet access service is not before the Court, it would either be the "telecommunications rate," which is likely several times higher than the cable rate, *see Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶¶ 53-61, or an unregulated rate. Thus, at a minimum, a CLEC would pay significantly more for its Internet access service pole attachments than the multimedia cable companies seek to pay.

Ultimately, the Act serves to protect access to utility poles to provide cable and telecommunications service. It does not subsidize monolithic multimedia companies as they roll out new technology, to the disadvantage of their competitors and at the expense of electric ratepayers. And denying regulated rates for commingled cable service and Internet access service will not deny multimedia cable companies the other benefits of the Act, such as mandatory access. They will simply have to pay a market rate. This will not be a monopoly rate, but a rate that reflects just compensation for the utility property being taken, determined in accordance with applicable law governing the taking of property for public use. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

II. THE POLE ATTACHMENTS ACT DOES NOT APPLY TO ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT.

The Federal Petitioners contend that the general reference to "any attachment by a cable television system or provider of telecommunications service" in the definition of "pole attachment" means that the Pole Attachments Act extends to attachments of wireless telecommunications equipment.[21] This argument ignores several key facts. Repeated clarifications in other provisions of the Act confirm that it relates strictly to "wire communications" and to "wires, cables, and

[21] Petitioner NCTA neither sought *certiorari* on this issue nor briefed it.

associated equipment." The FCC's own administration of the Act has never in eighteen years applied the Act to anything but wireline equipment. Applying the ratemaking and other provisions of the Act to wireless equipment will create nonsensical results. Turning poles into antenna structures will result in unwarranted and undue regulatory inequities. Finally, the FCC's regulation of wireless equipment under the Act would be unnecessary, uninvited and dangerous interference in an industry that has thrived in a free market just as Congress intended.

A. The Unambiguous Plain Meaning Of The Act Excludes Wireless Telecommunications Equipment.

The FCC's interpretation of the Act as to wireless equipment is analyzed under the familiar principles of *Chevron*, 467 U.S. 837. *See Whitman*, 121 S. Ct. 903. If the Act "resolves the question" of whether wireless equipment is covered, then "that is the end of the matter." *Id.* at 916 (quoting *Chevron*, 467 U.S. at 842-43). The Act does resolve the question, and the Court need go no further.

The Act begins with a plain language limitation of the FCC's jurisdiction that focuses specifically on wires. "The term 'utility' [*i.e.*, those required to provide access under the Act] means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any **wire communications**." 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998) (emphasis added).[22] The Act's explicit focus on wires continues in its

[22] The 1996 amendments did not change the triggering requirement that a pole owner must use its poles for "wire communications" for the Act to apply. *Compare* 47 U.S.C. § 224 (1978), *with* 47 U.S.C. § 224 (1994 & Supp. IV 1998). As the Eleventh Circuit observed, that pole owners that do not use their poles for wire communications are excluded from the Act supports a narrow reading of the FCC's authority. *Gulf Power II*, 208 F.3d at 1274 n.24. The Federal Petitioners' interpretation would lead to an anomalous result. A pole owner that used a fraction of its poles for wire communications would subject its pole network to being saturated with wireless equipment. A pole owner that used every one of its poles for wireless communications could refuse access to all telecommunications equipment, whether wireless or wireline.

ratemaking standards, both for the cable service rate and telecommunications service rate, which are based on the "usable space" occupied by the attachment on a pole. 47 U.S.C. §§ 224(d) and (e) (2000). "Usable space" is defined as "the space above the minimum grade level which can be used for the attachment of **wires, cables, and associated equipment.**" *Id.* at § 224 (d)(2) (emphasis added).

It would make no sense for the Act to talk about attachments for which no usable space is defined, if only because there would be no way to apply the Act's ratemaking standards. Wireless communications equipment does not fit within the definition of "wires" or "cables," and neither the Federal Petitioners nor the Wireless Industry *Amici* argue that wireless equipment falls within the definition of "associated equipment." Congress did not amend the definition of "usable space" in 1996. Had Congress intended radically to alter the types of attachments allowed under the Act, Congress would have amended the long-standing phrase "wires, cables and associated equipment," for example by adding a reference to "wireless antennas, transmitters and other wireless transmission equipment." But no such amendment was made.

Instead of addressing this point, Petitioners simply argue that wireless carriers are "telecommunications carriers" and that wireless carriers sometimes use wires to connect their wireless transmission equipment to their customers or to their network or other networks. These arguments confuse the issue of who is entitled to make pole attachments with the

issue of what they are entitled to attach. The issue before this Court is the equipment to be attached, not the business in which its owner is engaged.[23] Regardless of whether wireless service providers are "telecommunications carriers" and regardless of whether they sometimes use wires and cables, the fact remains that their wireless transmission equipment, such as antennas and transmitters, is outside the scope of the Act.

The Act's narrow grant of jurisdiction to the FCC tracks the legislative history showing Congress' intent to grant jurisdiction over only a sliver of the space on poles owned by electric utilities, an industry and infrastructure not regulated by the FCC prior to the Act. Prior to the enactment of the Pole Attachments Act in 1978, the FCC had no jurisdiction to regulate pole attachments because the leasing of utility pole space "did not constitute communication by wire or radio." S. Rep. No. 95-580, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 122. Congress gave the FCC jurisdiction over pole attachments and permitted "federal involvement in pole attachment matters . . . where space on a utility pole had been designated and was actually being used for communications service by wire or cable . . . . This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems." *Id.* at 15.[24]

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[23] As the Wireless *Amici* contend, they frequently use wires as part of their systems. Brief of Association for Local Telecommunications Services, et al., at 14. Therefore, the Congressional directive that "all" telecommunications carriers should have pole attachment rights can be effectuated, and this statutory language can be given meaning, without concluding that wireless transmission equipment is a permissible attachment.

[24] An early version of the Act gave the FCC jurisdiction over "any attachment for wire communication." H.R. Rep. No. 94-1630, at 2 (1976). The language was changed to narrow the Act's application to "any attachment by a cable television system" because the FCC was concerned that the earlier language would give it unintended and undesired overbroad jurisdiction. H.R. Rep. No. 94-1630, at 30-31.

The Federal Petitioners and *amici* make much of the "any attachment" language of 47 U.S.C. § 224(a)(4). Their argument is that the term "any attachment" by a provider of telecommunications service must be read expansively, so that "any" literally means "any and every," and thus encompasses wireless attachments or, presumably, anything else a provider chooses to attach. Respondents agree that a wireless communications carrier must be considered a "provider of telecommunications service," but to say "any attachment" should be given unlimited scope, without reference to the very specific context of "wires, cables and associated equipment" provided elsewhere in the Act, would lead to an absurd result. If Petitioners' out-of-context readings were correct, the Act would apply, and the FCC would have ratemaking jurisdiction over, literally every item attached to a pole by a telecommunications or cable provider. A cable company could attach a cable video monitor, advertising signage or lighting. If a telecommunications company lacked space in its office for a switch, splitter or a router, it could hang a cabinet on any utility pole to install the needed equipment. Indeed, if Petitioners' reading were correct, why couldn't any of the thousands of start-up telecommunications companies formed in response to the 1996 Act simply go into the outdoor advertising business using cheap access to utility poles in lieu of billboards? This cannot be what Congress meant; thus, the natural and contextual limit the Act places on the term "attachment" is that it be wires.

The Eleventh Circuit correctly held that when the provisions of the Act are read as a whole, the FCC has authority to regulate attachments for wire communications and, by negative implication, has no authority "over

attachments to poles for *wireless* communications." *Gulf Power II*, 208 F.3d at 1273-74.[25] The scheme of the Communications Act as a whole supports this conclusion. Where Congress desired to address the siting of wireless equipment, it did so specifically and unambiguously, such as carefully circumscribing the authority of state and local governments to regulate the placement of wireless equipment. *Id.* at 1275. *See also* 47 U.S.C. § 332 (1994 & Supp. IV 1998). If Congress intended to regulate the placement of wireless equipment in the Pole Attachments Act, it could and would have expressly done so.

The legislative history of the Pole Attachments Act reveals congressional policy that supports this plain language analysis. Congress enacted the Act in 1978 to prevent electric utilities from charging monopoly rents for attachment to their essential, or "bottleneck," facilities. *Gulf Power II*, 208 F.3d at 1274. Nothing in the legislative history suggests that Congress believed utility poles were bottleneck facilities for wireless equipment.[26] In fact, they are not. Wireless

[25] In discerning the meaning of statutory provisions, the Court has frequently drawn conclusions by negative implication. *See e.g., Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 121 S. Ct. 941, 944 (Feb. 20, 2001) ("The structure of the Farm Credit Act indicates by negative implication that banks for cooperatives are not entitled to [implied tax] immunity.").

[26] Indeed, nothing in the legislative history of the 1996 Telecommunications Act suggests that Congress still believed utility poles were bottleneck facilities for wireline attachments. If they ever were—there has never been a factual or legal finding to that effect—it is no longer the case. Cable companies and wireline telecommunications providers have many alternatives to utility poles, including burial of cable and wires and the use of wireless and satellite signals transmitted from other structures. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 F.C.C.R. 978, 983-84 (2000). Attachers simply do not want to pursue these alternatives because they will cost a bit more than the mandatory access they receive at regulated rates to utility poles. However, when

equipment can be, and is, placed on any tall structure, including buildings, towers, flagpoles and church steeples. And far fewer antennas, and thus poles, are needed to transmit wireless signals in a given area than wires and poles are needed to transmit wireline signals in the same area. There simply is no reason the Act should mandate access for wireless equipment to utility poles. *Id.* at 1275.

B. The FCC's Interpretation Is Unreasonable.

Although the Act unambiguously excludes wireless equipment from its ambit, to the extent that the Court finds the statute to be "silent or ambiguous" on the issue, it must proceed to *Chevron* step two and "defer to a 'reasonable interpretation made by'" the FCC. *Whitman*, 121 S. Ct. at 916 (quoting *Chevron*, 467 U.S. at 844). However, the FCC's interpretation of these provisions is unreasonable and would not be a proper subject of deference. As the Court's recent decisions indicate, it will not hesitate to vacate agency decisions which exploit gaps in statutes in a manner that is inconsistent with the statute's purpose, other applicable provisions or limits on the agency's authority. *Whitman*, 121 S. Ct. at 916; *Brown & Williamson*, 529 U.S. at 123; *Iowa Utilities*, 525 U.S. at 392; *MCI Telecommunications*, 512 U.S. at 228-31.

multimedia cable giant Charter Communications was unable to agree to a new pole attachment agreement with Georgia Power Company, it first indicated that it would instead bury its cables, but then built a "headend" station to transmit its cable signals through wireless signals. David Elmore, *Charter Commun-ications Offers Digital Cable*, MARIETTA DAILY J., Apr. 17, 2001. Charter was thus able to choose one of two options for obviating attachment to Georgia Power's poles.

In addition, as discussed *supra* at n.20, Congress has left huge holes in access to utility poles by excluding railroads, cooperatively organized electric utilities, and government owned electric utilities from the requirements of mandatory access. *See* 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998). It is hard to believe Congress would have done this if it truly believed utility poles were "bottleneck facilities."

1. The FCC's Own Interpretations Of The Act Focus Exclusively On Wire Attachments.

Although the Pole Attachments Act, from 1978 until today, has always contained the "any attachment" language Petitioners now say applies to wireless equipment, the FCC has never previously interpreted the Act to apply to anything but wires. During the period when the "any attachment" language applied only to cable television systems—from 1978 to 1996—equipment "associated" with cable wires, such as the power boosters or amplifiers that cable operators routinely use to maintain cable signals over longer distances,[27] was routinely attached to poles but was never the subject of regulated rates. *Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, 56 Rad. Reg. (P&F) (1984). In addition, cable operators have neither demanded nor received regulated pole attachment rates for wireless equipment, despite the fact that cable operators have always made extensive use of wireless equipment. Neither the Government nor the Wireless *Amici* has cited any history of the FCC using the Act to regulate the attachment to utility poles of equipment other than wires.

The FCC's own interpretation of the Act—most recently confirmed on May 25, 2001—has acknowledged and incorporated the reality that the rate formulas set forth in the Act "do not account for the unusual requirements of wireless attachments" and wireless attachments must be dealt with on a "case-by-case basis." *1998 Report and* Order, 13 F.C.C.R. at 6879; *Consolidated Partial Reconsideration Order*, FCC

[27] Equipment that is "associated" with wires and cables would include passive equipment such as a splitters and connectors needed to join wires and cables together at connection points, *see Texas Cablevision Co. v. Southwestern Elec. Power Co.*, 1985 FCC LEXIS 3818 (Feb. 26, 1985), but not simply any piece of equipment that has a wire or cable attached to it.

01-170 at ¶¶ 43-45.[28] Indeed, the FCC's own rules, by which it promulgated the "cable rate" formula, only address wire attachments, and in fact presume that a wire attachment will be made in about one inch of the pole's communications space. *1979 Adoption of Rules for Pole Attachments*, 72 F.C.C. 2d at 79. In sum, the FCC has always interpreted "any attachment" not to apply to anything but a wire. As the Eleventh Circuit noted, the "FCC seemed to recognize that this might be the case when it stated that, "there are potential difficulties in applying the Commission's rules to wireless pole attachments." *Gulf Power II*, 208 F.3d at 1275 n.27 (quoting *1998 Report and Order*, 13 F.C.C.R at 6799).

Notwithstanding this long-standing interpretation and notwithstanding the inapplicability of the Act's ratemaking standards based on "usable space" to wireless attachments, the Commission responded to the 1996 amendments to the Act by claiming authority to make up on an *ad hoc* basis whatever wireless attachment rate formula it saw fit: "If the parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through negotiations, the Commission will examine the issues on a case-by-case base." *Id. See also*

[28] The Commission admitted that wireless equipment involves, "more than a traditional box-like device and cable wires strung between poles." 13 F.C.C.R. at 6879. The Commission failed, however, to address the question of how such equipment would fit within the statutory reference to "wires, cables and associated equipment." 47 U.S.C. § 224(d)(2) (1994). The Commission simply parrots the statutory language, in its own Rules, 47 C.F.R. § 1.1402(c) (2000), which define "usable space" as the space that can be used for, "wires, cable (sic) and associated equipment," and in fact blindly applies this definition in the context of telecommunications carriers. The Commission failed to apply its expertise or provide a reasoned explanation as to how the wireless equipment it described could be considered, "associated equipment" within the meaning of the Act and its own rules and as a result the Commission's decision to assert jurisdiction over wireless equipment attachments is not entitled to deference.

Consolidated Partial Reconsideration Order, FCC 01-170 at ¶¶ 43-45. The Commission's problem is not in the difficulty of regulating "unique attachments"; rather, the Commission's problem is its own consistent acknowledgment that it has no basis—either statutory or practical—on which to exercise its purported jurisdiction.

2. Attachment Of Wireless Equipment Will Create Unintended and Undue Regulatory Inequities.

The Commission's expansion of the Act to encompass wireless equipment will create unwarranted regulatory inequities and is inconsistent with other Commission decisions and regulations that are closely related to the Act. First, attaching wireless equipment to utility poles may well subject them to regulation as antenna structures. "The term antenna structure includes the radiating and/or receive [sic] system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a) (2000). Because the FCC deems the owner of the tower structure, and not the owner of the wireless equipment, to be responsible for filing and amending a proper antenna structure registration, pole owners may potentially be subject to fines of up to one million dollars for regulatory violations. *See* 47 U.S.C. §§ 503(b)(1)(B) and 503(b)(2)(b)(1994); *Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures*, 15 F.C.C.R. 8676 (2000); 47 C.F.R. § 17 (2000). Pole owners *cum* wireless tower owners may also be required to navigate the maze of regulatory control over wireless equipment Congress has left to state and local governments. *See* 47 U.S.C. § 332(c) (1994 & Supp. IV 1998). Surely Congress could not have intended to add insult to injury, first forcing pole owners to accept wireless equipment, then forcing them to take responsibility for regulatory compliance.

3. The Wireless Industry Enjoys A Thriving Market And Neither Needs, Nor Was Intended To Receive, Congressional Largesse.

To date, the FCC has not engaged in any proceeding establishing rate regulation for attachment of wireless equipment, other than to say that the rates will be determined on an *ad hoc* basis when a dispute arises. *Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶¶ 43-45. Owners of wireless equipment or utility poles have not sought the assistance of the FCC to establish any regulated rates. In short, the FCC has not exercised its self-proclaimed jurisdiction under the Act. The result is that the wireless industry has continued the dynamic growth it began long before the 1996 amendments to the Act.

In 1983, companies began to offer cellular phone service to the public, and in each year between 1983 and 1995, "cellular subscriber growth . . . approached or exceeded fifty percent," reaching a level of approximately twenty-five million users. *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, 8848 (1995). As of year-end 1999, mobile telephony, only one of three sectors of the wireless industry identified by the Commission, generated more than $40 billion dollars in revenue and served over 86 million subscribers, representing 32 percent of the country's population. *2000 CMRS* Report, 15 F.C.C.R. at 17664-68.

The Commission expects the healthy level of competition to fuel industry wide growth and product diversification. *Id.* at 17665. This is evidenced by recent mergers allowing wireless providers to operate on a nationwide scale. *Id.* at 17669-71. It is also evidenced by the advent and use of new technologies like digital over analog and PCS in conjunction with cellular. *Id.* at 17672-75. In fact, the Commission recognizes that the overlapping use of cellular and PCS

spectrum indicates that the industry plans "to expand capacity and/or offer additional services. *Id.* at 17675. Meanwhile, perhaps the most telling fact is that prices for mobile telephony service dropped more than 11 percent between 1999 and 2000. *Id.* at 17663-65.

Through all of this, as *Amici* Real Access Alliance and Site Operators and Managers Alliance of the Personal Communications Industry Association show, the market for wireless communications towers has thrived. The rental rates for wireless towers are far in excess of any proportionate rates that could be analogized under the FCC's formulas, yet towers have sprung up all around the country.

Although the Commission issues a report each year on the wireless industry and the factors underlying its growth, the Commission has not once identified the Pole Attachments Act as an impetus for the industry's successful expansion. *See 2000 CMRS Report*, 15 F.C.C.R. at 17668; *In the Matter of Implementation of Section 6002(b) of the Budget Reconciliation Act of 1993*, 13 F.C.C.R. 19746, 19756 (1998). Indeed, the Commission excluded Section 224 from a list of provisions in the 1996 Telecommunications Act that affected the wireless industry. *Id.* at 19756 ("The 1996 Act resulted in several proceedings that affect many CMRS operators: Interconnection, Universal Service, Number Portability, Forbearance, Biennial Review, and Customer Proprietary Information.").

The proof, as they say, is in the pudding. Congress did not intend for the FCC to regulate rates for attachment of wireless equipment and, without the FCC's application of the Act, the wireless industry has developed a dynamic market for its products, resulting in additional choice and lower prices for consumers as well as innovation and expansion by wireless providers.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES PUBLIC LAWS
95th Congress—Second Session
Convening January 19, 1978

PL 95-234 (HR 7442)
February 21, 1978

COMMUNICATIONS ACT AMENDMENTS OF 1978

An Act to amend the Communications Act of 1934 to provide for the regulation of utility pole attachments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Communications Act Amendment of 1978".

* * *

Sec. 6. Title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"REGULATIONS OF POLE ATTACHMENTS

"Sec. 224. (a) As used in this section:

"(1) The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or right-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government any State.

"(2) The term 'Federal Government' means the Government of the United States or any agency or instrumentality thereof.

"(3) The term ' State' means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

"(4) The term 'pole attachment' means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

"(b)(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.

"(2) Within 180 days from the date of enactment of this section the Commission shall prescribe by rule regulations to carry out the provisions of this section.

"(c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

"(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

"(A) it regulates such rates, terms, and conditions; and

"(B) in so regulating such rates, terms and conditions, the State has the authority to consider and

does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

"(d)(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduct, or right-of-way.

"(2) As used in this subsection, the term 'usable space' means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

"(e) Upon the expiration of the 5-year period that begins on the date of enactment of this Act the provisions of subsection (d) of this section shall cease to have any affect.".

Sec. 7. The amendments made by this Act shall take effect on the thirtieth day after the date of enactment of this Act; except that the provisions of sections 503(b) and 510 of the Communications Act of 1934, as in effect on such date of enactment, shall continue to constitute the applicable law with the respect to any act or omission which occurs prior to such thirtieth day.

Approved February 21, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-721 and 95-721, pt. 2 (Comm. on Interstate and Foreign Commerce).

SENATE REPORT No. 95-580 accompanying S. 1547 (Comm. on Commerce, Science, and Transportation).

CONGRESSIONAL RECORD:

Vol. 123 (1977): Oct. 25, considered and passed House.

Vol. 124 (1978): Jan. 31, considered and passed Senate, amended, in lieu of S. 1547.

Feb. 1, House concurred in Senate amendment, with amendments.

Feb. 6, Senate disagreed to House amendments Nos. 1, 2, and 3; concurred in amendment No. 4, with an amendment. House receded from amendments Nos. 1, 2, and 3; concurred in Senate amendment of No. 4.